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No.

In the Supreme Court of the United States

October Term, 1982

UNITED STATES ex rel. JAKE LAPIN

Petitioner,

v.

INTERNATIONAL BUSINESS MACHINES CORP.

Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals

For the Ninth Circuit

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QUESTIONS PRESENTED

1. Whether the District Court erred in applying the jurisdictional bar when the Plaintiff-Relator made a showing that:

(a) the federal agencies to whom the Relator made his prefiling disclosures via hot lines established by the Government to facilitate the collection of such solicited information, had failed to take the required corrective action;

(b) the General Services Administration and the United States Attorney were more concerned with concealing the fact that over the years certain Government Contracting Officers allowed the Defendant to become unjustly enriched at taxpayer's expense by hundreds of millions of dollars rather than taking that action

required by 3 Stats. 723 to discontinue these illegal contracting practice and to make the required report of their existence to the President;

(c) the information actually provided by the Relator to the Government prior to suit concerned only the omission by the Government to claim refunds due the Government and this information could not and did not alert the Government to any wrongdoing on the part of the Defendant; and,

(d) the Defendant will be permitted to permanently retain unclaimed overbillings with impunity.

2. Is the District Court's decision in accordance with expressed Congressional intent and the essential purpose of the False Claims Act?

III

3. Did the District Court err in resolving all apparent inconsistencies in the Relator's pleadings in favor of the Defendant?

IV

LIST OF ALL PARTIES

Parties Petitioner:

Jake Lapin

United States of America

Parties Respondent:

International Business

Machines Corp.

TABLE OF CONTENTS

Questions Presented I

List of All Parties IV

Opinions Below 2

Jurisdiction 2

Statutory Provisions Involved . . . 3

Statement of the Case 4

Reasons for Granting the Writ . . . 13

Conclusion 19

Appendix:

Decision and Order Granting Defendant's Motion to Dismiss for Lack of Jurisdiction of the United States District Court (May 16, 1980) A1

Opinion of the United States Court of Appeals for the Ninth Circuit (February 26, 1982) A22

Order of the United States Court of Appeals for the Ninth Circuit Denying Motion for Rehearing (April 28, 1982) A25

Table of Contents Cont.

Prefiling Disclosures of Information to Government by Relator A27

Affidavit of Relator's Supervisor Included in Pleadings A30

Relator's Original Information That Was Provided to District Court A33

TABLE OF AUTHORITIES

Cases

Pettis ex rel. United States v. Morrison-Knudsen Co., 577 F.2d 668 (9th Cir. 1978) 8, 18, A13, A16, A17, A18, A23, A24

United States ex rel. Marcus v. Hess, 317 U.S. 537, 63 S. Ct. 379, 87 L.Ed. 443 (1943) . . 6, A13

United States v. Pittman, 151 F.2d 851 (5th Cir. 1945) cert. denied, 328 U.S. 843, 66 S.Ct. 1022, 90 L.Ed. 1617 (1946) 16, A13

United States v. Rippetoe, 178 F.2d 735 (4th Cir. 1949) . 9, 11, 14, 15, 20, A13, A16, A17

United States v. Borden Co., 347 U.S. 514, 74 S.Ct. 703, 98 L.Ed. 903 (1954) A20

Carlson v. Coca-Cola Company, 483 F.2d 279 (9th Cir. 1973) A20

United States v. Florida, 615 F.2d 1370 (5th Cir. 1980) 16, A23

Table of Authorities Cont.

Safir v. Blackwell, 579 F.2d 742 (2d Cir. 1978), cert. denied, 441 U.S. 943 (1978) 16, A23

United States v. Aster, 275 F.2d 281 (3d Cir.), cert. denied, 364 U.S. 894 (1960) 16, A23

United States ex rel. Joseph v. Cannon, 642 F.2d 1373 (D.C. Cir. 1981) 17, A23

Statutes and Regulations

28 U.S.C. 1254 (1) 2

31 U.S.C. 231 et seq. . . . . Passim

15 U.S.C. 15 . . . . . A5, A19

15 U.S.C. 45 . . . . . A5

57 Stat. 608 . . . . . A12

31 U.S.C. 529 20

3 Stats. 723 20

12 Stats. 696 . . . . . A13

10 Op. Atty. Gen. 288 (1862) . . 20

Hawaii Revised Statutes, Chapters 480, 481, 481A A6

Miscellaneous

Rule 12(b)(1), F.R.C.P. A2

Rule 56(f), F.R.C.P. A9

89 Cong. Rec. 10849 (Dec. 17, 1943) A15

No.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals

For the Ninth Circuit

The Petitioner, Jake Lapin, respectfully asks that a Writ of Certiorari issue to review the final opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on February 26, 1982. Rehearing was denied

on April 28, 1981, which action overruled and denied Petitioner's Petition for Rehearing of the Court's decision entered February 26, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is unpublished Memorandum No. 80-4312, DC No. 79-0264, dated February 26, 1982. The District Court for the District of Hawaii's opinion is reported in 490 F. Supp. 244. All opinions appear in the Appendix herein.

JURISDICTION

The opinion of the Court of Appeals for the Ninth Circuit was entered on February 26, 1982. A timely Petition for Rehearing was denied on April 28, 1982, and this petition was filed within 90 days of that date. The jurisdiction

of this Court is invoked under 28 U.S.C. 1254 (1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 31, Sections 231 et seq.

(The above provisions deemed pertinent are set out in detail in App. A1 of this petition.)

STATEMENT OF THE CASE

On June 15, 1979, Petitioner-Relator Jake Lapin filed a qui tam action, pursuant to the False Claims Act, 31 U.S.C. 231 et seq., on behalf of himself and the United States against International Business Machines Corp. ("IBM"). The complaint alleged that IBM had made false claims upon the Government in the form of overbillings for rentals of automatic data processing ("ADP") equipment by the various federal agencies and it sought to assess the fines and forfeitures against IBM prescribed by Section 231.

First enacted in 1863 to protect the Government against false claims during times of war, the False Claims Act has been used regularly to prosecute frauds since its enactment. The most

striking provision of the Act, section 232(B), allows qui tam actions -- suits by private citizens on behalf of the Government as well as themselves. If a suit by a qui tam plaintiff leads to recovery, the plaintiff is entitled to a portion of the recovery under section 232(E).

Petitioner-Relator Lapin commenced this action pro se and disclaimed any reward in the event the Government would take over the suit. Section 232(C) gives the Attorney General of the United States the opportunity to enter the suit and prosecute it. In its report to the District Court, the United States, by the Acting Assistant Attorney General, declined to enter the suit. It stated its "opinion that its rights (could) be more effectively asserted under the

contract and through administrative channels" and its concern that subject matter jurisdiction may be lacking under the 1943 amendments to the Act.

The Act was substantially amended in 1943 following the decision in Marcus v. Hess, 317 U.S. 537 (1943). That case construed the Act to allow "parasitic" suits, that is, suits based solely upon information obtained from the Government, including, for example, from Government indictments. The 1943 amendments were intended to stem the flood of parasitic suits by denying jurisdiction in federal courts for suits based on information in the possession of the Government when the suit was filed.

Because the Petitioner-Relator commenced this action pro se, the district court refused to allow the

United States to be represented on a pro se basis. Thus, Petitioner-Relator obtained counsel on November 2, 1979 and filed a First Amended Complaint on December 26, 1979.

IBM moved to dismiss the action because it considered the prefiling disclosures of information to Government by Relator (App. A27) and affidavit by Relator's supervisor (App. A30) to be an admission that Relator gathered information regarding the alleged fraud while he was an employee of the Government and prior to filing Relator had informed the Government of the basis of his claim. There were some apparent inconsistencies in the Relator's pleadings and these were resolved in favor of Defendant.

IBM's motion to dismiss was heard

on March 17, 1980 and on May 16, 1980, the district court issued a decision and order granting Defendant IBM's Motion to Dismiss for lack of subject matter jurisdiction. The district court ruled that section 232(C) of the False Claims Act deprived the court of jurisdiction.

There are four major points in the ruling. First, that decision purported to apply the rule laid down by the Ninth Circuit in Pettis v. Morrison-Knudsen Co., 577 F.2d 668 (9th Cir. 1978), that section 232(C) precludes jurisdiction where the informer gives his "information" to the Government before filing suit and then the Government fails to enter the suit. The district court stated that since "Lapin has told the United States the suspicions upon which he bases his suit," his action was barred.

Second, the decision recognized the exception to the jurisdictional bar established in United States v. Rippetoe, 178 F.2d 735 (4th Cir. 1949), where the information on which the suit is based is already possessed by a Government employee, but that person has participated in the fraud and is interested in concealing it. The district court said it found no specific support for the Rippetoe exception in the record.

Third, the decision briefly treated the issue of how much information in the hands of the Government at the time of the suit is sufficient to raise the jurisdictional bar. On this point, the district court again claimed it followed the Pettis decision. The district court held it was unnecessary to examine the amount of information because "Lapin

does not even allege that he has more information than does the Government."

Finally, the decision said that there was no "reason to delay ruling ... pending discovery, since it is not even alleged that such discovery would show that Plaintiff-Relator had more information than did the Government at the time the suit was filed."

Plaintiff-Relator thereafter timely moved for reconsideration of the decision and order. In the affidavits and exhibits submitted with the motion and memorandum that followed, the Plaintiff-Relator addressed each of the four points in the decision and order. Primarily these materials showed from the Record that the suit was based on original information in the hands of the Plaintiff-Relator at the time of filing (See App. A33) and

that the information possessed by the Government at that time was negligible. The materials also demonstrated support in the Record for excepting this suit from the jurisdictional bar under the rule in Rippetoe or under a similar rationale. In a short memorandum Defendant IBM opposed reconsideration on procedural grounds.

On June 9, 1980, Judge King denied the motion for reconsideration without elaboration. Plaintiff-Relator thereafter made timely appeal to the United States Court of Appeals for the Ninth Circuit on June 10, 1980. Oral argument was held on January 12, 1982 which was limited to fifteen minutes per party, and a memorandum decision was issued on February 26, 1982. On March 9, 1982, Relator Lapin, acting pro se, filed his

Petition for Rehearing and on April 28, 1982, such Petition for Rehearing was denied.

REASONS FOR GRANTING THE WRIT

The Courts of Appeal are in conflict with respect to the question of whether an informer can file and prosecute a 31 U.S.C. 232 qui tam action after such informer provides certain information concerning false claims and the Government either fails to take action on such disclosures or elects not to take over the suit.

This question is of considerable importance in view of the fact that the General Accounting Office has determined that the United States is overcharged by about $25 billion each year.

Presently, practically every federal agency has established its own hot line for the purpose of soliciting information from the public concerning fraud, waste, and/or abuse in Government

for the purpose of taking corrective action on such disclosures. However, corrective action is not always taken because the Department of Justice's Civil Divison is not adequately staffed to prosecute actions for the recovery of false claims that were paid by the Government. Also, there have been numerous instances where the federal agencies, after becoming aware of false claims, prefer to conceal them or frustrate any private prosecution because such false claims were made possible because Government officials violated federal laws and regulations.

Within this scenario the Courts of Appeal are in conflict as to the right of an informer to bring an action. For example, the Fourth Circuit, in United States v. Rippetoe, 176 F.2d 753

(4th Cir. 1949), is the most liberal in allowing the private prosecution of 31 U.S.C. 232 actions. In addition to not requiring that the Relator negative information alleged to be in the hands of the Government, Rippetoe allows exceptions to the literal language of the statute to carry out the legislative purpose and to avoid absurd consequences. Indeed, Rippetoe makes an exception where there is a showing that Government employees were either a party to the transactions which enabled the false claims to be paid or desire to conceal the fact that such false claims were, in fact, paid. Thus, under Rippetoe, neither the Government nor the unjustly-enriched Defendant would be able to frustrate any efforts on the part of an informer to privately prosecute a

31 U.S.C. 232 action after the Government declines to enter the suit.

The Second, Third, and Fifth Circuits allow an informer to prosecute an action after the Government declines to take over the suit when the informer can show that he possessed original information that he did not disclose to the Government prior to filing suit. Safir v. Blackwell, 579 F.2d 742 (2d Cir. 1978), cert. denied, 441 U.S. 943 (1978); United States v. Aster, 275 F.2d 281 (3d Cir.), cert. denied, 364 U.S. 894 (1960); United States v. Pittman, 151 F.2d 851 (5th Cir. 1945), cert. denied, 328 U.S. 843 (1946); United States v. Florida, 615 F.2d 1370 (5th Cir. 1980).

The District of Columbia Circuit allows an informer to prosecute a

31 U.S.C. 232 action after the Government refuses to take over the suit when the information in possession of the Government prior to the filing of the suit could not have alerted the Government to any wrongdoing on the part of the Defendant. This Circuit also requires that any inconsistencies in the Relator's pleadings be resolved in favor of the Relator. United States ex rel. Joseph v. Cannon, 642 F.2d 1373 (D.C. Cir. 1981).

The Ninth Circuit has established a functional test rather than apply the comparative test previously used by the Second, Third, and Fifth Circuits and thus will not allow an informer to prosecute an action when the evidence and information in possession of the United States at the time the False Claims Act eas brought was sufficient to enable it

adequately to investigate the case and to make a decision whether to prosecute. Pettis v. Morrison-Knudsen Co., 577 F.2d 668 (9th Cir. 1978).

CONCLUSION

The Ninth Circuit Court of Appeals should have overruled the district court and allowed the private prosecution of this suit to judgment because the Relator made a showing that:

(1) The Government could never have had sufficient information to investigate the case and decide whether to prosecute because it neither maintained the necessary records nor preserved an audit trail from which it could reconstruct computer rental transactions during the years the 1410 model was replaced with a 360 series model computer;

(2) A typical overbilling for replacing a second-generation 1410 model computer with a third generation 360/50 model computer during 1968 amounted to $56,000 because the required performance

testing period was delayed for the purpose of setting up the replacement computer to accommodate the same programs used by the replaced computer;

(3) The Public Record discloses that the General Services Administration allowed its Contracting Officers to permit the Defendant to engage in billing practices which were specifically prohibited by 3 Stats. 723, 31 U.S.C. 529, and 10 Op. Atty. Gen. 288 (1862) and then concealed these facts it the report it made to Congress via the Special Counsel to the Merit Systems Protection Board;

(4) The Rippetoe exception and/or a Rippetoe-like exception puts the Relator outside the scope of the jurisdictional bar because the Public Record on file with the Merit Systems Protection Board's

Office of the Special Counsel discloses that the United States Attorney responsible for prosecuting this action, after declining to enter the suit, then took action to prevent the FBI from completing an investigation underway of IBM's billing practices;

(5) All and any inconsistencies in Relator's pleadings were wrongfully resolved in favor of Defendant;

(6) The jurisdictional bar was never intended by Congress to apply to non-parasitical suits where the Relator had previously disclosed to the Government information that it had solicited by virtue of its expressed or implied promise to take the necessary corrective action and then refuses to take the corrective action required by federal law;

(7) The literal application of the amendment language defeats the essential purpose of the statute and leads to the absurd consequence of IBM being able to permanently retain with impunity hundreds of millions of dollars it illegally overbilled the Government; and,

(8) The Respondent is a judicially-recognized whistle blower entitled to statutory protection in his endeavor to correct that waste, fraud, and/or abuse that he had previously disclosed to the Government for the expressed purpose of correction and thus can assume the role of a private United States Attorney when the Government, through its own Attorney, fails to act under the mandate of federal law requiring it to act.

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May 28, 1982

A1

DECISION AND ORDER

GRANTING DEFENDANT'S MOTION TO

DISMISS FOR LACK OF JURISDICTION

(Filed May 16, 1980)

Civil No. 79-0264

UNITED STATES DISTRICT COURT

DISTRICT OF HAWAII

UNITED STATES ex rel. JAKE LAPIN,

Plaintiff

v.

INTERNATIONAL BUSINESS MACHINES CORP.

Defendant

SAMUEL P. KING, District Judge

Plaintiff-Relator Jake Lapin filed this qui tam suit on behalf of himself and of the United States against International Business Machines Corporation ("IBM") pursuant to the False Claims Act, 31 U.S.C. 231 et seq., alleging that IBM made false claims upon the Government of the United States in the form of "provisional overbillings" and seeking to

assess against Defendant IBM double damages and a $2,000 fine pursuant to section 231.

The case is presently before this Court on Defendant IBM's Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) on the ground that this Court lacks subject matter jurisdiction. After considering the briefs of counsel and oral argument of March 17, 1980, this Court grants Defendant's Motion to Dismiss.

FACTUAL BACKGROUND

On June 15, 1979, Plaintiff-Relator Lapin filed pro se a qui tam action pursuant to the False Claims Act, 31 U.S.C. 231 et seq., against IBM. Lapin then obtained counsel and filed on December 26, 1979, a First Amended Complaint and on March 14, 1980, an Affidavit concerning the allegations

in his original pro se complaint.

In his First Amended Complaint and his Affidavit, Lapin states that he became aware of the contractual arrangements between the United States and IBM that are the subject of this suit while he was a government employee. He alleges that since around 1973 various agencies of the United States Government have entered into yearly written contracts with IBM (the standard form of which is exemplified by Contract GS-00C-01522) pursuant to which the Government leases automatic data processing equipment. These contracts provide that IBM will make billings from the installation date of the equipment, but that the billings are subject to subsequent adjustment if the equipment does not perform at the requisite level. Specifically, should there be any interval

between installation and the onset of the equipment's "successful performance period" (a period of 30 or 90 days, depending on the model of the equipment, during which the equipment performs at an effectiveness level of at least 90%), then the Government is entitled, upon application, to a refund for the lease rent billed by IBM for that interval. Lapin contends that the Government does not maintain the records necessary to make application for refunds for these alleged "provisional overbillings," that it has rarely applied for such refunds, and that he suspects that the Government is entitled to refunds that it does not know about and has not claimed. Lapin states that he told various agencies of the Government his suspicions, but that they took no action.

He further claims that only IBM has access to the information necessary to determine the amount of the "provisional overbillings."

In Counts I through VI of his First Amended Complaint, Lapin alleges that the "provisional overbillings" constitute "false claims" under 31 U.S.C. 231. Counts VII and VIII of the First Amended Complaint add federal and state causes of action for "deceptive practices in commerce." In Count VII Lapin alleges that the "provisional overbillings" were in violation of the Federal Trade Commission Act, 15 U.S.C. 45 et seq., apparently asserting jurisdiction based on section 4 of the Clayton Act, 15 U.S.C. 15. Count VIII is a pendent state claim in which Lapin alleges that the "provisional overbillings" were in

violation of Chapters 480, 481, and 481A of the Hawaii Revised Statutes.

The False Claims Act, 31 U.S.C. 231 et seq., establishes a cause of action against persons making false claims upon the United States. Section 231 defines such claims and sets forth the liability of persons making those claims. Section 232 outlines the procedure for such suits; specifically, section 232(A) confers jurisdiction over such suits on the district courts, section 232(B) provides for qui tam suits, and section 232(C) allows the United States to enter appearance in and carry on such suits, provided that it is timely and diligent in doing so. Section 232(C) also deprives the district courts of jurisdiction in qui tam suits based on information in the possession of the United States.

On October 23, 1979, the United States, by an Acting Assistant Attorney General, filed a Report to the Court in which it declined to appear in this suit, stating its "opinion that its rights (could) be more effectively asserted under the contract and through administrative channels" and its concern that this Court may lack subject matter jurisdiction. The United States requests, however, that any dismissal by this Court be made without prejudice to its right to bring suit at a later date.

Defendant IBM filed a Motion to Dismiss the original Complaint on August 7, 1979, and a Motion to Dismiss the First Amended Complaint on January 7, 1980, on the ground that this Court has no jurisdiction in this case.

ISSUES PRESENTED

Defendant IBM contends that under section 232(C) this Court has no jurisdiction over the "false claims" counts in this case. IBM makes three arguments in support of this contention: first, that the United States had information sufficient to enable it to bring this suit at the time Lapin filed it; second, that Lapin disclosed to the United States the information upon which he bases his suit before he filed it, and hence the information was in the possession of the United States at the time this suit was filed; and third, that Lapin learned of the information upon which he bases his suit as a government employee. IBM also contends that Lapin has no standing to bring the federal "deceptive practices" count, and that therefore this Court has

no jurisdiction over the pendent state "deceptive practices" count.

Lapin, after obtaining counsel, argues on analogy to Federal Rule of Civil Procedure 56(f) that this Court should not conclude that it does not have jurisdiction in this case until it permits Plaintiff-Relator to discover information known to IBM but not to Lapin or the United States.

RULING

Section 232(C) of the False Claims Act, 31 U.S.C. 231 et seq., deprives this Court of jurisdiction in suits based on information already in the possession of the United States at the time the suit is brought. Plaintiff-Relator in this case makes no allegation that his suit is based on information beyond that he

gave the Government before he brought this suit. Hence, section 232(C) deprives this Court of jurisdiction.

Jurisdiction over the "false claims" counts in this case must derive from the jurisdictional grant in section 232. Subsection (A) grants district courts jurisdiction over section 231 suits generally, whether the suit is brought by the United States or brought under subsection (B) as a qui tam suit by a relator "as well for himself as for the United States . . . ." Subsection (C) makes further provisions regarding qui tam suits:

> Whenever any such suit shall be brought by any person under clause (B) of this section notice of the pendency of such suit shall be given to the United States by serving upon the United States attorney for the district in which such suit shall have been brought a copy of the bill of complaint and by sending by registered

mail, or by certified mail, to the Attorney General of the United States at Washington, District of Columbia, a copy of such bill together with a disclosure in writing of substantially all evidence and information in his possession material to the effective prosecution of such suit. The United States shall have sixty days, after service as above provided, within which to enter appearance in such suit. If the United States shall fail, or decline in writing to the court, during said period of sixty days to enter any such suit, such person may carry on such suit. If the United States within said period shall enter appearance in such suit the same shall be carried on solely by the United States. In carrying on such the United States shall not be bound by any action taken by the person who brought it, and may proceed in all respects as if it were instituting the suit. Provided, That if the United States shall fail to carry on such suit with due diligence within a period of six months from the date of its appearance therein, or within such additional time as the court after notice may allow, such suit may be carried on by the person bringing the same in accordance

> with clause (B) of this section.

Thus, if the United States wants to carry on the suit, it must enter the suit in a timely fashion and pursue it diligently; if it fails to do so, the relator may carry on the suit. Inaction by the United States does not affect the jurisdiction of the district court.

This was the extent of section 232(C) prior to the 1943 amendment, 57 Stat. 608, which added the following language:

> The court shall have no jurisdiction to proceed with any such suit brought under clause (B) of this section or pending suit brought under this section whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought . . . .

The Ninth Circuit reviewed the legis-

lative history of the 1943 amendment to section 232(C) in Pettis ex rel. United States v. Morrison-Knudsen Co., 577 F.2d 668 (9th Cir. 1978):

> Early in 1943 the Supreme Court held, under the then existing version of the False Claims Act, which had its origin in the Act of March 2, 1863, 12 Stat. 696, c. 67, that a qui tam or informer action could be maintained by a private person on behalf of the United States even when based solely on information acquired from an indictment. United States ex rel. Marcus v. Hess, 317 U.S. 537, 545-48, 63 S.Ct. 379, 87 L.Ed. 443 (1943). The immediate concern of Congress was to do away with these so-called 'parisitical suits.' United States v. Pittman, 151 F.2d 851, 854 (5th Cir. 1945), cert. denied, 328 U.S. 843, 66 S.Ct. 1022, 90 L.Ed. 1617 (1946); United States v. Rippetoe, 178 F.2d 735, 736 (4th Cir. 1949).

Id. at 671. Congress was loathe to have plaintiff-relators receive compensation under section 232(E) for bringing suits based on information that already had

been gathered by the Government in the course of law enforcement.

The 1943 amendment pertains to circumstances that in all respects parallel the circumstances covered by the original section 232(C) except that the informer has gone first to the United States with information, yet the amendment does not place the parallel requirement on the United States that it bring the suit in a timely fashion and pursue it diligently. Nor does it allow the suit to be brought by the informer if the United States does not bring suit itself. Instead, if the qui tam suit is based on information already in the United States' possession, the amendment completely deprives the district courts of jurisdiction. The face of the amendment evidences no concern as to whether or not there is a suit filed

regarding the alleged false claims; rather, it leaves entirely in the hands of the United States the decision as to whether and how vigorously to proceed on the information.

The debate over the amendment in the House of Representatives evidences possible confusion on this very issue, as the court in Pettis noted:

> MR. KEFAUVER. In the second place, if he has information and he gives it to the Government, and the Government does not proceed in due course, provision is made here where that suit can be brought and where he can get some compensation?
>
> MR. HANCOCK. That is correct.

89 Cong. Rec. 10849 (Dec. 17, 1943). 577 F.2d at 672. However, it is clear from the language of the statute that the informer who has turned over his information to the United States cannot bring

a suit under section 232 if the Government then fails to act. As the court in Pettis concluded:

> We have no doubt that under such circumstances the intent of Congress resides in the words of the statute. That is, discharge of our obligation to follow the intent of Congress requires that we assume that Congress said what it meant and meant what it said.

577 F.2d at 672.

Application of section 232(C) would seem most egregious in the case in which an honest informer reports information of a false claim to a government official who himself is involved in the fraud. The Fourth Circuit has carved an exception to the section 232(C) jurisdictional bar in just such a case, United States v. Rippetoe, 178 F.2d 735 (4th Cir. 1949), reasoning that knowledge on the part of an agent engaged in an attempt to defraud his principal will not be imputed to the

principal and that, therefore, the United States does not possess the information. Plaintiff-Relator Lapin does not argue that the Rippetoe exception should apply in this case, nor does anything in the record suggest that to be appropriate. To the contrary, the United States' Report to the Court suggests that the Government is considering various avenues available to remedy any existing problems.

In Pettis, appellant-relator Pettis argued that there should be exceptions to section 232(C) jurisdictional bar for cases in which the Government's information had been supplied by the relator and for cases in which the relator had information beyond that in the possession of the Government. The court in Pettis refused to recognize the appellant's first proposed exception on the basis

of its reading of the statute in light of its legislative history, as discussed above. It also refused to recognize the appellant's second proposed exception on the facts in Pettis, although it refrained from stating a standard as to "the extent in which the information on which the suit is based must be identical to the information in the possession of the United States in order for the jurisdictional bar to be invoked." 577 F.2d at 674. In the instant case, Plaintiff-Relator Lapin does not even allege that he has more information than does the Government. There is, therefore, no room to argue the second exception in this case. Neither is there reason to delay ruling on the motion before this Court pending discovery, since it is not even alleged that such discovery would show that

Plaintiff-Relator had more information than did the Government at the time suit was filed.

None of the possible exceptions to section 232(C) is applicable, and the language of section 232(C), as interpreted by the Ninth Circuit in the light of its legislative history, clearly deprives this Court of jurisdiction in this case in which Plaintiff-Relator Lapin has told the United States the suspicions upon which he bases his suit. Counts I through VI therefore must be dismissed for lack of jurisdiction.

Lapin also alleges federal and state "deceptive practices" claims, apparently basing jurisdiction on section 4 of the Clayton Act, 15 U.S.C. 15. However, Lapin has no standing to assert a claim on behalf of the United States under the

antitrust laws. Insofar as the United States has been harmed, "under section 4 of the Act, . . . it is the Attorney General and the United States district attorneys who are primarily charged by Congress with the duty of protecting the public interest under (this law)." United States v. Borden Co., 347 U.S. 514, 518, 74 S.Ct. 703, 98 L.Ed. 903 (1954). Section 4 of the Clayton Act makes no provision for qui tam actions. In any event, section 4 does not confer jurisdiction over suits for violations of the Federal Trade Commission Act. The Federal Trade Commission Act makes no provision for a private right of action, either explicit or implicit; "the Act vests initial remedial power solely in the Federal Trade Commission." Carlson v. Coca-Cola Company, 483 F.2d 278, 280 (9th Cir. 1973) (citations omitted).

Accordingly, Count VII must be dismissed.

This Court thus has no jurisdiction over Plaintiff's federal claims and therefore must dismiss Count VIII, Plaintiff's pendent state claim.

IT IS HEREBY ORDERED that Defendant IBM's Motion to Dismiss is GRANTED, without prejudice to the right of the United States to assert on its own behalf the allegations contained in this case.

DATED: Honolulu, Hawaii, May 16, 1980.

/s/ SAMUEL P. KING
United States District Judge

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

(Filed February 26, 1982)

No. 80-4312

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES ex rel. JAKE LAPIN

Plaintiff-Appellant

v.

INTERNATIONAL BUSINESS MACHINES CORP.

Defendant-Appellee

BEFORE: BROWNING, Chief Judge; SKOFIL and NORRIS, Circuit Judges

Lapin filed a qui tam action on behalf of himself and the United States under the False Claims Act, 31 U.S.C. 231, et seq. He appeals the district court's dismissal of the action for lack

of subject matter jurisdiction, 31 U.S.C. 232(C). We affirm.

The trial court did not err in dismissing Lapin's action. It properly found that when a citizen's qui tam suit is based upon information "in the possession of the United States, or any agency, officer or employer thereof, at the time such suit was brought," the district court has no jurisdiction to proceed. 31 U.S.C. 232(C). See Pettis ex rel. United States v. Morrison-Knudsen Co., 577 F.2d 668, 670-73 (9th Cir. 1978). See also United States v. Florida, 615 F.2d 1370 (5th Cir. 1980); Safir v. Blackwell, 579 F.2d 742 (2d Cir.), cert. denied, 441 U.S. 943 (1978); United States v. Aster, 275 F.2d 281 (3d Cir.), cert. denied, 364 U.S. 894 (1960). Compare United States ex rel.

Joseph v. Cannon, 642 F.2d 1373, 1378 (D.C. Cir. 1981). Lapin's attempt to characterize information held by the Government as mere suspicions rather than hard evidence, must fail. The record reflects that the "evidence and information in possession of the United States at the time the False Claims Act suit was brought was sufficient to enable it adequately to investigate the case and to make a decision whether to prosecute." Pettis ex rel. United States v. Morrison-Knudsen Co., supra, 577 F.2d at 673.

AFFIRMED.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING MOTION FOR REHEARING

(Filed April 28, 1982)

No. 80-4312

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES ex rel. JAKE LAPIN

Appellant

v.

INTERNATIONAL BUSINESS MACHINES CORP.

Appellee

Appeal from the United States District Court for the District of Hawaii
Samuel P. King, District Judge, Presiding

BEFORE: BROWNING, Chief Judge, SKIPIL and NORRIS, Circuit Judges

The panel has voted to deny the petition for rehearing.

The petition for rehearing is denied.

A27

PREFILING DISCLOSURES OF INFORMATION

TO GOVERNMENT BY RELATOR

June 6, 1979

MEMORANDUM TO: Messrs. Walter Heen

and Michael Setrrett

SUBJECT: Unjust enrichment to IBM at

taxpayers expense

This memorandum is to confirm my recent oral report to you about a $56,000 refund due CINCPAC by IBM because of certain authorized overbilling practices that had not been adjusted at the time an IBM model 360/50 rental computer was rendered operational after completion of the prerequisite period of satisfactory performance. For certain reasons unknown to me I was physically transferred from Honolulu to Arlington, Virginia before I had the opportunity to determine whether IBM actually refunded CINCPAC the $56,000

overpayment I detected. Presently, Mr. George Miyashiro, IBM Administration Operations Manager in Honolulu, will not tell me whether IBM actually made the refund to CINCPAC.

What is of even more fundamental importance is the fact that had I been allowed to pursue this matter (follow the string) in lieu of being involuntarily transferred, I believe I could have identified about $56 million in over-billings per 1,000 IBM 360/50 rental computers. Furthermore, I would have definitely recommended that IBM be contractually held accountable and responsible for ensuring that adjustment is made for those authorized provisional overbillings.

I have already reported these conditions to both the GSA and GAO

through their respective hotlines. Also, I am ready, willing, and able to assist all federal agencies in determining whether they are entitled to such refunds. I would appreciate it if you would keep me advised as to the action, if any, that is being taken to get these refunds.

Sincerely yours,

/s/ JAKE LAPIN

P. O. Box 23334

Honolulu, Hawaii 96822

A30

AFFIDAVIT OF RELATOR'S SUPERVISOR

INCLUDED IN THE PLEADINGS

STATE OF HAWAII)
)
CITY AND COUNTY OF HONOLULU)

Charles O. Shelton, Jr., being first duly sworn, on oath, deposes and says:

1. That I was the immediate supervisor of the Plaintiff Lapin from April 1966 to January 1969 when he was employed at the Defense Audit Office Honolulu and that during January 1969, the Plaintiff was involuntarily transferred to Arlington, Virginia under a new employment agreeement;

2. That prior to such involuntary transfer, a Major Plaskett, who was the CINCPAC Deputy Computer Officer, contacted his son's godfather, GS-15 Arthur Goldstein, who was employed by

the Defense Audit Service in Washington, D. C. and discussed the Plaintiff's performance on the CINCPAC Computer Audit underway;

3. That as a direct result of GS-15 Arthur Goldstein's intervention, my supervisor in Washington, D. C., GS-16 Seymour Rubin, directed me, in writing, to investigate the desirability of removing the Plaintiff Lapin from the audit because of alleged incompetence and/or unsuitability;

4. That I performed the required investigation and submitted a written report that there was no reason to remove Mr. Lapin from the CINCPAC Computer Audit; and

5. That Mr. Lapin was physically removed from Honolulu before his audit report was published, and thus he was

precluded from ever determining whether a $56,000 overpayment to IBM that he detected was ever refunded to CINCPAC.

/s/ CHARLES O. SHELTON

Subscribed and sworn to before me this 5th day of June, 1979.

/s/ MARJORIE TAM

Notary Public, First Circuit Court
State of Hawaii

My Commission Expires: 3/7/80

RELATOR'S ORIGINAL INFORMATION THAT WAS PROVIDED TO DISTRICT COURT

1. The Government does not maintain centralized records showing the identity of each federal agency renting a computer from IBM under the IBM ADP Schedule Pricelist.

2. The various federal agencies renting computers from IBM under the ADP Schedule Pricelists do not maintain records showing installation date of computer and date the acceptable performance period was attained.

3. IBM bills the federal agencies renting computers from it in an amount in excess of that actually chargeable under law.

4. IBM commences to bill the Government for computer rentals prior to the

date such computers were accepted by the Government as being fully operational.

5. IBM will not disclose its knowledge to the Government regarding overbillings.

6. IBM maintains centralized records pertaining to individual computer rentals which can be used to identify and compute overbillings.

7. IBM advised the Plaintiff-Relator that it was not its policy to voluntarily refund overpayments by the Government.

8. IBM will only make refunds of overbillings on the basis of formal claims that must be supported by detailed records maintained by the Government.

9. Practically all Government employees responsible for certifying IBM invoices for computer rentals do not

understand the billing provisions included in the annual IBM ADP Schedule Pricelists or recognize the IBM requirement to maintain special records for the purpose of claiming refunds for prior overbillings as being a valid one.

10. IBM does not certify that its annual ADP Schedule Pricelists conform to the requirements of the contract (the General and Special Provisions as well as the terms and conditions in the Solicitation, Offer and Award).

11. IBM's annual ADP Schedule Pricelists authorize billing procedures that are in violation of those prescribed by the General and Special Provisions as well as the terms and conditions in the Solicitation, Offer and Award. . . .

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No. 81-2218

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES *ex rel.* JAKE LAPIN,
Petitioner,

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR THE RESPONDENT IN OPPOSITION

MAX O. TRUITT, JR.
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Counsel for Respondent

Dated: June 30, 1982

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

The False Claims Act, 31 U.S.C. §§ 231 *et seq.*, permits individuals to bring *qui tam*, or informer, suits to recover on behalf of the United States damages and penalties on account of false claims made against the United States. That Act provides, however, that the federal courts are without jurisdiction to proceed with any *qui tam* suit "whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States . . . at the time such suit was brought . . . ." 31 U.S.C. § 232(C). The question here presented is:

Whether the False Claims Act deprived the district court of jurisdiction over this *qui tam* action where it appeared that before bringing suit the *qui tam* plaintiff had disclosed to the federal government all the evidence and information upon which his suit was based.*

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* Respondent International Business Machines Corporation has no parent company and numerous wholly-owned subsidiaries. It is, indirectly, the owner of an interest in Discovision Associates. Minor percentages of the stock of some of its other subsidiaries are held by other shareholders. Those subsidiaries are: International Business Machines of Belgium S.A., IBM European Office (Brussels) S.A., Compagnie IBM France, S.A., Cie, IBM Madagasikara, S.A., IBM Europe, S.A., IBM Southern Area Development, S.A., IBM Trade Development, S.A., IBM Ireland Limited, IBM Israel Ltd., IBM Italia, S.p.A., Companhia IBM Portuguesa, S.A.R.L., IBM Argentina, S.A., IBM do Brasil-Industria, Maquinas e Servicos Ltda., IBM de Costa Rica, S.A., IBM de Honduras, S.A., IBM de Mexico, S.A., IBM de Panama, S.A., IBM Philippines, Incorporated, IBM Thailand Company Limited, and IBM de Exportacion y Servicios, S.A.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
STATUTORY PROVISIONS INVOLVED	1
STATEMENT	2
ARGUMENT	4
CONCLUSION	5

TABLE OF AUTHORITIES

Cases:	Page
Pettis ex rel. United States v. Morrison-Knudsen Co., 577 F.2d 668 (9th Cir. 1978)	4, 5
Safir v. Blackwell, 579 F.2d 742 (2d Cir. 1978), *cert. denied*, 441 U.S. 943 (1979)	4
United States v. Aster, 275 F.2d 281 (3d Cir.), *cert. denied*, 364 U.S. 894 (1960)	4
United States v. Florida, 615 F.2d 1370 (5th Cir. 1980)	4, 5
United States v. Rippetoe, 178 F.2d 735 (4th Cir. 1949)	3, 4
United States ex rel. Joseph v. Cannon, 642 F.2d 1373 (D.C. Cir. 1981), *cert. denied*, 102 S. Ct. 85 (1982)	5
United States ex rel. Vance v. Westinghouse Electric Corp., 363 F. Supp. 1038 (W.D. Pa. 1973)	5
Statutory Provisions:	
False Claims Act, 31 U.S.C. §§ 231 *et seq.* (1976 & Supp. II 1978)	i, 1, 2
31 U.S.C. § 232	i, 2, 3

IN THE

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OCTOBER TERM, 1981

No. 81-2218

UNITED STATES *ex rel.* JAKE LAPIN,
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Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (Memorandum No. 80-4312, February 26, 1982) (Pet. App. A22)[1] is unpublished. The opinion of the United States District Court for the District of Hawaii (Pet. App. A1) is reported at 490 F. Supp. 244 (D. Hawaii 1980).

STATUTORY PROVISIONS INVOLVED

The False Claims Act, 31 U.S.C. §§ 231 *et seq.*, provides in relevant part:

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[1] Citations to "Pet. App." refer to the appendix to the petition for writ of certiorari filed by petitioner Jake Lapin.

"(A) The . . . district courts of the United States, . . . shall . . . have full power and jurisdiction to hear, try, and determine such [False Claim Act] suit."

"(B) Except as hereinafter provided, such suit may be brought and carried on by any person, as well for himself as for the United States . . . ."

"(C) . . . The court shall have no jurisdiction to proceed with any such suit brought under clause (B) of this section . . . whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought: . . ."

31 U.S.C. § 232.

STATEMENT

In a memorandum decision, the court below upheld the judgment of the United States District Court for the District of Hawaii that it was without jurisdiction under the False Claims Act ("the Act") (31 U.S.C. §§ 231 *et seq.*), over a *qui tam* suit based upon evidence and information that the plaintiff had disclosed to the government before he filed suit. The controversy arose as follows:

For a number of years IBM and the General Services Administration have negotiated and entered into annual contracts governing the acquisition by government agencies of IBM automatic data processing equipment. (Pet. App. A3.) Under those contracts, equipment rented to the government is subject to a 30-day successful performance period before rent is due. (Pet. App. A3-A4.) Nonetheless, the contracts permit IBM to bill for the rental equipment from the date of installation, subject to a credit if completion of the successful performance period is delayed. (*Id.*)

Petitioner, purporting to act on behalf of himself and the United States, filed a *qui tam* suit against IBM under

the Act claiming that rental invoices submitted by IBM before completion of the successful performance period constituted false claims within the meaning of the statute. (Pet. App. A5.) In his pleadings and memoranda to the district court, petitioner averred that before bringing suit he had advised officials at the Department of Justice, the General Services Administration and the General Accounting Office, of his evidence and information. (See Pet. App. A4.) He acknowledged that his suit was based upon evidence or information in the possession of the United States at the time it was brought, that he had decided to give his information to the United States for its use rather than first bringing an action on his own initiative, and that he had obtained the information needed to bring this suit by reasons of his government employment. (Pet. App. A3, A10.)

IBM moved to dismiss the action on the ground that the suit was "based upon evidence or information in the possession of the United States . . . at the time such suit was brought." (31 U.S.C. § 232(C).)[2] The district court found that petitioner had made no allegation that his suit was based upon information beyond what he gave to the government before he filed suit. The court recognized the exception to the jurisdictional bar in the case of an honest informer who reports false claim information to a dishonest government official (*United States v. Rippetoe*, 178 F.2d 735 (4th Cir. 1949)), but declined to invoke the exception because nothing in the record suggested that there was any ground for doing so. (Pet. App. A17.) Accordingly, it granted IBM's motion, holding that section 232(C) deprived it of jurisdiction. Petitioner appealed, and the Court of Appeals for the Ninth Circuit affirmed,

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[2] The United States, which has a right to take over and prosecute a case begun by a *qui tam* plaintiff, 31 U.S.C. § 232(C), declined to appear in the action, advised the district court it could protect its rights "under the contract and through administrative channels," and indicated that the court lacked subject matter jurisdiction of petitioner's action. (Pet. App. A7.) The district court's judgment dismissing the action expressly stated that it was without prejudice to the government's rights. (Pet. App. A21.)

holding that the district court had properly dismissed the action for lack of subject matter jurisdiction. (Pet. App. A21.)

ARGUMENT

Review of this case is not warranted. The decision below satisfies none of the criteria for the exercise of certiorari jurisdiction and, in any event, is plainly correct.

The only reason advanced in support of a grant of certiorari is a purported conflict among the courts of appeal on the question of jurisdiction over *qui tam* suits. There is no conflict; all the courts of appeal that have considered the issue have held that the statute is unambiguous and deprives the court of jurisdiction whenever—as is the case here—the information upon which the suit was based was in the possession of the government, even though the *qui tam* plaintiff was the source of the government's information. *United States v. Florida*, 615 F.2d 1370, 1371 (5th Cir. 1980); *Safir v. Blackwell*, 579 F.2d 742, 746-47 (2d Cir. 1978), *cert. denied*, 441 U.S. 943 (1979); *Pettis ex rel. United States v. Morrison-Knudsen Co.*, 577 F.2d 668 (9th Cir. 1978); *United States v. Aster*, 275 F.2d 281, 283 (3d Cir.), *cert. denied*, 364 U.S. 894 (1960).

As the district court found, there was neither any contention nor any factual basis for invoking the exception noted in *United States v. Rippetoe*, 178 F.2d 735 (4th Cir. 1949). (Pet. App. A17.) That exception—that evidence in the hands of a government official who is involved in a scheme to defraud the government will not defeat jurisdiction—is based on the well-accepted rule that "knowledge of an agent who is engaged in an attempt to defraud his principal will not be imputed to the principal," 178 F.2d at 737, and is consistent with the statutory language and other case law. Nor, as the district court found, was this a case where the government possessed some evidence or information before suit was

filed, and the *qui tam* plaintiff claimed to have additional information. (Pet. App. A18.) *See, e.g., United States ex rel. Joseph v. Cannon*, 642 F.2d 1373 (D.C. Cir. 1981), *cert. denied*, 102 S. Ct. 1630 (1982); *United States ex rel. Vance v. Westinghouse Electric Corp.*, 363 F. Supp. 1038 (W.D. Pa. 1973). Here, as the court below observed, the government had sufficient evidence and information before the suit was filed "to enable it adequately to investigate the case and to make a decision whether to prosecute." (Pet. App. A24, citing *Pettis ex rel. United States v. Morrison-Knudsen Co.*, 577 F.2d at 674. *See also, United States v. Florida*, 615 F.2d at 1371.) Finally, the soundness of the decisions below and the lack of merit of the petition are further shown by the fact that the information on which the suit was based was in the government's possession because petitioner obtained it by reason of his government employment. (Pet. App. A7.) The statute, therefore, deprived the district court of subject matter jurisdiction over the suit, and the court of appeals correctly affirmed its judgment of dismissal.

CONCLUSION

For the foregoing reasons the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Dated: June 30, 1982

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No. 81-2218

In the Supreme Court of the United States

October Term, 1981

UNITED STATES ex rel. JAKE LAPIN

Petitioner,

v.

INTERNATIONAL BUSINESS MACHINES CORP.

Respondent.

PETITIONER'S REPLY MEMORANDUM

On Petition for a Writ of Certiorari

To the United States Court of Appeals

For the Ninth Circuit

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Dated: July 8, 1982

No. 81-2218

In the Supreme Court of the United States

October Term, 1981

UNITED STATES ex rel. JAKE LAPIN

Petitioner,

v.

INTERNATIONAL BUSINESS MACHINES CORP.

Respondent.

PETITIONER'S REPLY MEMORANDUM

The Respondent IBM, in its opposing brief in No. 81-2218, argues that review of this case is not warranted because the decision on appeal satisfies none of the criteria for the exercise of certiorari jurisdiction and, in any event, such decision is plainly correct. The Peti-

tioner disagrees because it has neither been made to appear nor can it ever be made to appear that this suit was based upon evidence or information in the possession of the United States at the time this suit was brought. This is because the United States neither maintained performance testing records nor provided any audit trail from which it could reconstruct the underlying computer rentals from IBM by the various federal agencies authorized to make calls under the open end contracts between GSA and IBM.

So much of the District Court record which has been incorporated as App. A-27 through A-35 in this Petition No. 81-2218 clearly shows that the decision on appeal was based on erroneous findings of fact by the trial judge and/or his resolution of certain apparent inconsistencies in

Petitioner Lapin's pleadings in favor of the Respondent IBM. Indeed, the Petitioner's prefiling disclosures in App. A-27 did not and could not alert the United States to any wrongdoing on the part of the Defendant IBM which could support a False Claims suit under 31 U.S.C. 231 and these innocous disclosures did not constitute all of the Petitioner's original evidence or information. Indeed, some of the original informtion which was withheld from the United States is included in App. A-33 and such information was obtained by the Petitioner Lapin after he left Government service and acted as a private citizen.

Also, the disclosures in App. A-27 through A-35 trigger the Rippetoe exception or a Rippetoe-like exception. Such an exception would allow the private

prosecution of this action not only because the Government lacks the information to bring a False Claims suit but as well because its own officials violated certain public laws which were intended to prevent the Government from being overbilled in the first instance and then other officials concealed these violations in an official audit report submitted to Congress through the Special Counsel of the Merit Systems Protection Board.

Certain information and evidence which was accepted by the United States Court of Appeals for the Ninth Circuit and which was incorporated, by reference, in Petitioner Lapin's Petition for Rehearing as Exhibits "A" through "E" clearly shows that the Ninth Circuit not only had departed from the accepted and

usual course of judicial proceedings but sanctioned as well a similar departure on the part of the District Court, as to call for an exercise of this Honorable Court's power of supervision over these two lower federal courts.

Specifically, after the Ninth Circuit allowed the Respondent IBM to introduce into evidence four copies of GSA Audit Report 2S-00232-00-11 prepared by the Office of Audits of the Office of the Inspector General of the GSA for use by Congress, the Petitioner Lapin submitted four copies of five related documents in the public record in order that the Ninth Circuit Panel would have access to a complete public record concerning the purpose and validity of this GSA Audit Report. This Audit Report was prepared as a result of certain testimony by the

Petitioner Lapin around March 5, 1980 before a Congressional Subcommittee concerning reprisal actions taken against Government employees (whistle blowers) who attempted to either disclose and/or to correct that waste, fraud, or abuse Congress had intended to have disclosed and corrected.

Among other things, these five documents contain factual information which (a) triggers the Rippetoe exception; (b) shows that the GSA is unable to claim refunds due the United States for all overbillings it authorized IBM to submit for payment because the cognizant federal agencies renting such computers did not maintain the performance test records prescribed by IBM and for which IBM would accept as the only basis for determining overbillings and for formally claiming

refunds from IBM; (c) shows that Government officials engaged in illegal and prohibited contracting practices and violated the controlling provisions of the annual contracts with IBM when they permitted IBM to bill in an amount in excess of that chargeable or bill prior to acceptance; (d) shows that the persons charged with investigating and correcting these conditions by vigorously pursuing refunds due the United States concealed such conditions and otherwise prevented an investigation in process by the FBI of IBM's billing practices from being completed; and, (e) shows that the Executive Office of the President, Office of Management and Budget supports this qui tam action and has referrred these matters to the Department of Justice's Office of Professional Responsibility for action.

The Ninth Circuit Panel apparently did not consider these five documents in formulating its decision. The Petitioner Lapin believes that its failure to do so constituted such a departure from accepted and usual judicial proceedings as to call for an exercise of this Honorable Court's power of supervision.

The Respondent IBM admits that all payments by the Government for computer rentals between the date of installation and date of acceptance constitute over-payments for which refunds are due the Government. However, IBM will only pay refunds that are based on those formal performance test records it required the Government to maintain and which IBM, in fact, knows are not maintained by the various federal agencies which placed rental orders under the basic contract.

Thus, when the Petitioner Lapin submitted a formal claim for refund of $56,000 on a single model 360-50 rental transaction during 1968 when this model computer was rented to replace a model 1410, IBM would not process this official claim for refund even though it was aware that the Petitioner Lapin was then an internal auditor employed by the Office of the Secretary of Defense. Since no performance test records had been maintained by the federal agency renting this model 360-50 computer, the Petitioner Lapin based his claim for refund on the performance test records maintained by the Respondent IBM. However, the Petitioner Lapin was precluded from taking further action on this matter because he was involuntarily removed from the audit by persons in supervision who were more interested in concealing these conditions

than in correcting them.

Unless this Honorable Court grants this Petition, IBM will be permitted to permanently retain its ill-gotten gains with impunity and the existing conflicts among the Courts of Appeals concerning the jurisdictional bar will continue to exist. So far as these conflicts are concerned, it would appear that the United States Court of Appeals for the District of Columbia would have ruled differently on this case. The Petitioner contends that the Ninth Circuit should have applied District of Columbia law since the basic computer rental contract between the Government and IBM was negotiated in the District of Columbia.

The Petitioner Lapin has made a showing that the decision on appeal is not only contrary to expressed Congressional

intent but defeats the essential purpose of the False Claims Act as well because the Petitioner Lapin is not and never was in a race with the Government to the courthouse. Indeed, the Petitioner Lapin has acted because of a moral obligation and a statutory duty, based on his previous civil servant status, his oath of office, and the solicitations made by the GSA and GAO hot lines, to help enforce those federal laws which require the United States Treasury to be made whole again. The Petitioner Lapin has gone on record that he is willing to turn over this suit to the Government whenever the Government can demonstrate that it is as desirous of pursuing the refunds due the United States as vigorously as the Petitioner Lapin is.

Accordingly, this Honorable Court

should either defer considering the Respondent IBM's opposition to Lapin's Petition for a Writ of Certiorari until such time as IBM voluntarily makes refund, ab initio, of all amounts it overbilled the United States or grant the Writ in order that Lapin can proceed to make the United States Treasury whole again. This request is based on the fact that Lapin has made a showing that the App. A-27 disclosures to the United States had been solicited by the Government by its promise of correction and that Lapin has otherwise satisfied the criteria for the exercise of certiorari jurisdiction.

Respectfully submitted,

JAKE LAPIN, Pro Se
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808-923-3291
Counsel of Record

Dated: July 8, 1982